No. 16,108.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

CORNELI SEED COMPANY,
Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the District of Idaho, Southern Division.

OPENING BRIEF OF APPELLANT.

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JURISDICTION.

This action was brought by the Union Pacific Railroad Company, appellee, as a common carrier under the Interstate Commerce Act, 49 U. S. C. A., Section 6, against the Corneli Seed Company, appellant, a shipper, for freight due for alleged undercharges claimed to arise from the application and allowance of transit rates from points of

origin to ultimate destinations for transit shipments instead of the combined local rates from point of origin to the transit point and from the transit point to ultimate destination.

The case was submitted on an agreed statement of facts to the United States District Court for the District of Idaho, Southern Division (R. 14). Jurisdiction of the District Court was based on Title 28, U. S. C. A., Section 1337 and Title 28, U. S. C. A., Section 1332 (R. 14).

From a decision and judgment of the District Court in favor of plaintiff, appellee herein, in the amount of $3,443.50 with interest at 6% from July 2, 1953, the defendant, appellant herein, has appealed.

This court has jurisdiction to review the judgment under the United States Judicial Code. Title 28, U. S. C. A. 1291 and Title 28, U. S. C. A. 1294.

STATEMENT OF FACTS.

This cause was submitted to the District Court under an agreed statement of facts, hence appellant deems it unnecessary to review the pleadings in detail (R. 14). The stipulation of facts shows the following:

Appellant, Corneli Seed Company, since at least January 5, 1944, and up to and including December 15, 1953, was engaged in the business of processing and wholesaling various seeds, and in the course of said business Corneli purchased seeds in carload lots from various growers, producers and processors at points in California, Idaho, Oregon and Washington, and shipped such seeds from points of origin over appellee's route to Twin Falls, Idaho, a specified transit point, where they were stopped in transit for processing and and then subsequently forwarded to destinations in other states (R. 14, 15).

A through or single factor rate was available to Corneli for said shipments under the terms of Union Pacific's transit tariff then in force, Twin Falls, Idaho being a designated transit point. Such transit tariff provided for a lesser rate than the combination of rates from points of origin to Twin Falls, Idaho, and from Twin Falls to final destinations (R. 15).

Among the numerous various rules and regulations of the transit tariff then in force relating to shipments from Twin Falls to eastern destinations it was provided that:

> "The bill of lading or shipping order must have inserted thereon the weight, point of origin and date of each inbound shipment covering the commodities forwarded."
>
> (R. 35, 36, 15)

From January 5, 1944 up to and including January or February, 1949, Corneli indicated the so-called "inbound" references, that is, point of origin, weight and commodity on standard forms of outbound bills of lading for transit shipments from Twin Falls to ultimate destinations. The through transit rate was applied and paid, credit being taken for the amount of the inbound freight previously paid for the shipment into the Twin Falls transit point at local rates (R. 14, 15).

It was ascertained that customers of Corneli were learning from said outbound bills of lading, which showed the point of origin, the identity of Corneli's producers and sources of supply and were purchasing directly from them. In order to effect discontinuance of this practice by Corneli's customers, beginning in January or February 1949 Corneli adopted, and Union Pacific concurred in, the following procedures respecting the application of through transit rates to Corneli's transit shipments: Corneli used Union Pacific's form of bill of lading for non-transit out-

bound shipments and paid the applicable rate from Twin Falls to ultimate destinations rather than the single factor transit rate from point of origin, although it was understood by the parties that such shipments were to receive transit rates. This form of bill of lading did not call for inbound data. Corneli then shortly after filed a claim for the application of the through single factor transit rate, supporting same by the original inbound freight bill which contained inbound references, that is, weights and point of origin and date which showed the transit rate was applicable (R. 16, 17). Corneli having paid the local rate into and out of Twin Falls, and the transit rate being lower than such combined rates, Union Pacific allowed and applied the transit rate and refunded the over payment to Corneli. The foregoing method of applying the through transit rate to Corneli's transit shipments continued until on or about December 15, 1953 when Union Pacific concluded that Corneli had not complied with its transit tariff by failing to show inbound data on outbound bills of lading (R. 20, 21).

This case involves the application by Union Pacific under the procedure above described of its transit rate to 9 carload lots of beans, peas or shelled corn shipped by Corneli through Twin Falls, where they were stopped in transit for cleaning and processing, during the months of February and March, 1953, and subsequently forwarded to various eastern destinations (R. 17, 18).

The claim for application of the transit rate and supporting bills of lading showing the inbound information entitling Corneli to the lower transit rate was made on April 15, 1953, and the transit rate was applied for these shipments and the overcharge refunded to Corneli. The transit rate was applied under the same procedure used and honored by Union Pacific since January or February, 1949 (R. 18, 20).

After the December 15, 1953, determination by Union Pacific that the application of the through transit rate procedure adopted did not comply with the transit tariff, Union Pacific filed this action on January 19, 1955, to recover the difference between the transit rate and the combined single local rates into and out of Twin Falls, which amount had been refunded to Corneli on its claim for application of the transit rate dated April 15, 1953, the sum involved being $3,443.50 with interest at 6% from July 2, 1953 (R. 5, 21). Corneli concedes that $127.74 of this amount is due Union Pacific by reason of a mathematical error in the application of the transit tariff (R. 19, 20).

Thereafter, on October 1, 1954, Corneli filed a complaint with the Interstate Commerce Commission challenging the applicability, reasonableness and lawfulness of the local rates respecting the shipments involved in this action and seeking Commission determination of a more reasonable route from California to Twin Falls by substituting Wells, Nevada, as an interchange point instead of Portland, Oregon.

By stipulation between the parties it was agreed that Corneli could have 20 days from which and after the decision of the Interstate Commerce Commission in which to plead to Union Pacific's complaint.

On March 27, 1956, the Interstate Commerce Commission made its report and order wherein it found that "the assailed rates and charges are not shown to have been or to be inapplicable, unjust or unreasonable", and the contention respecting the interchange point was disallowed with Commissioner Murphy dissenting (R. 39). A rehearing was denied August 30, 1956 (R. 22, 23)

The only omission in the bills of lading on outbound shipments from Twin Falls in controversy was the omission of inbound references, which information was provided on

the claim for application of the transit rates before same were applied and allowed. All 9 shipments were admittedly entitled to transit rates and were in fact transited shipments (R. 47, 48).

Thereafter, the District Court held that the procedure adopted was not a compliance with the transit tariff regulations and that Union Pacific was entitled to recover the $3,443.50 (and interest and costs paid by Union Pacific to Corneli respecting the 9 carloads of beans herein, and entered judgment accordingly.

Corneli duly filed its motion for a new trial and to amend the judgment. The motion was denied June 2, 1958. Deeming itself aggrieved by the decisions of the District Court and its failure to vacate or amend its judgment of April 14, 1958, Corneli duly prosecutes its appeal to the end that the judgment of April 14, 1958, be reversed, vacated and set aside, and appellant accorded such relief as it is entitled to under the record.

THE QUESTION PRESENTED.

The transit tariff of appellee, Union Pacific Railroad Company, provided that outbound bills of lading or shipping orders have inserted thereon inbound references showing the weight, point of origin and date of each inbound shipment covering the commodities forwarded and that the transit rate does not apply if shippers fail or decline to comply with such regulations.

Appellant, Corneli Seed Company, a shipper, and Union Pacific concurred in adopting a procedure which was pursued over four years, whereby Corneli made outbound shipments of seed admittedly entitled to the through transit rate from Twin Falls without showing on outbound bills of lading inbound references. Corneli then filed a claim

supported by the required inbound references for application of the through transit rate from point of origin to the final destination. Having previously paid the combined inbound freight from origin into and then out of Twin Falls, when Union Pacific applied the transit rate to the transit shipments, same being lower than the combined rates, it refunded the overcharge to Corneli. Deeming the transit rate to have been erroneously allowed and applied and that the higher combined local rates were applicable, Union Pacific sued Corneli for alleged undercharges of $3,443.50 and the District Court on an agreed statement of facts found for Union Pacific and against Corneli.

The question presented is whether the construction placed upon Union Pacific's transit tariff by both Union Pacific and Corneli that under the tariff transit rates were applicable to transit shipments upon the furnishing of inbound references of weight, origin and date after the date of outbound shipment was a proper construction and practice and a compliance with the tariff, or whether the furnishing of inbound references on outbound bills of lading at the date of forwarding was the only and exclusive method whereby the transit rate was applicable.

SPECIFICATION OF ERRORS.

1. Under the agreed statement of facts, the court erred as a matter of law in construing the Union Pacific transit tariff by holding that such tariff required Corneli, as a shipper, as a condition precedent to the application of a through transit rate to note at the time of shipment, inbound references on outbound bills of lading (R. 46, 47).

2. The court further erred in failing to hold that the construction of Union Pacific and Corneli that the transit rate was applicable and the tariff complied with so long as the inbound references were furnished prior to the allowance and application of the transit rate was a proper construction and a compliance with the transit tariff.

3. The foregoing errors of the court were given effect by its finding and judgment against appellant. The court erred in failing to sustain, and in denying, appellant's motion for a new trial and to amend the judgment of April 14, 1958 (R. 55) so as to find for appellant except with respect to $127.74 admittedly due appellee.

SUMMARY OF ARGUMENT.

The argument will be directed to the establishment of three propositions:

1. That the construction Union Pacific and Corneli placed upon Union Pacific's transit tariff that the tariff was complied with by the application of the transit rate to admittedly transit shipments upon receipt by Union Pacific of inbound data respecting point of origin, weight and date was a proper construction and application of the transit tariff and a compliance with the tariff. The court erred in failing to so hold.

2. That the tariff requirement that inbound references be noted on outbound bills of lading was not a mandatory condition precedent to application of transit rates to transit shipments and the court erred in failing to so hold.

3. That this case having been tried on an agreed statement of facts presents only a question of law respecting which the decisions of the District Court and of the Interstate Commerce Commission are not binding on this Court.

I.

At the outset, appellant acknowledges that, as stated by the District Court, tariffs are binding on shipper and carrier alike and it is presumed that a shipper knows the proper rates. Appellant concedes that a carrier cannot be estopped or waive the collection of applicable rates and that the law requires the carrier to charge and collect the applicable rates. These principles are well recognized and stem from the Interstate Commerce Act which prohibits discrimination and makes it a crime to give or receive rebates or preferences (R. 45, 46).

Although this court is doubtless familiar with "transit" procedures since it has had occasion to consider such matters as evidenced by its published opinions, it may be helpful to briefly describe transit operations. It is customary for all carriers to allow transit privileges, that is, a shipper may ship into a designated transit point (such as Twin Falls, Idaho, the transit point of Union Pacific involved in this case) and there unload the goods for storage or processing. The inbound bill of lading or freight bill is "recorded for transit" meaning thereby that the shipper has the privilege, usually for a year, of forwarding the same cargo to a final destination at the through transit rate from point of origin to final destination rather than the combination of the local rates which would be applicable for separate shipments into and out of the transit point. The court in Utah Poultry Producers Corp. v. Union Pacific R. Co. (10th Cir. 1945), 147 F. 2d 975, described transit privileges as follows, l. c. 976:

> "When a shipment is stopped in transit and is subsequently re-shipped to its ultimate destination, there are in fact two separate, distinct transportation services. Transit privileges rest upon the fiction that these two distinct transportations constitute a continuous shipment of an identical article from point of origin to the point of ultimate destination."

Thus, to take advantage of a transit privilege and rate the shipper must "forward" or ship outbound from the transit point identical cargo previously shipped to the transit point. Shippers such as Corneli customarily have large tonnage credits recorded for transit with carriers. As shipments are made outbound from the transit point the tonnage credit is debited by deducting the tonnage of the outbound cargo. As in this case, by the time the cargo is shipped outbound from the transit point the inbound freight has been paid. In cases where the combined rates

into and out of the transit point exceed the through transit rate the result is that there has been an overcharge for the inbound carriage and this is adjusted so as to exact only the applicable transit rate for the transit shipment.

In the case at bar, Corneli shipped 9 carloads of beans from points of origin in California, Oregon and Washington to Union Pacific's transit station at Twin Falls, Idaho, where the seeds were stopped in transit for processing and subsequently re-shipped to final destinations in Missouri, Wisconsin and Michigan (R. 17, 18). Union Pacific's transit tariff provided that there be noted on outbound bills of lading the weight, point of origin and date of the inbound shipment of the commodities forwarded (R. 15). From 1949 to 1953 the outbound bills of lading did not note inbound references, and Corneli paid freight at the combination local rates for separate shipments into and out of Twin Falls, and then claimed its transit privileges supporting its claim for allowance and application of the transit rate by supplying the inbound references. The Union Pacific thereupon allowed and applied the through transit rate and refunded the overcharge. The result was that Corneli paid the exact transit rate applicable to admittedly transit cargo (R. 17). By its action in this case Union Pacific seeks to apply the combination rates and collect on the theory it has undercharged Corneli and discriminated in its favor. Since only the lawful rate can be applied and paid, the question is which rate is lawful under the admitted facts. It is the position of Corneli that the through transit rate as applied, allowed and paid is the proper and lawful rate and that the collection in this case by Union Pacific of the combined rate would constitute the exaction of an illegal and discriminatory rate by subjecting transit cargo to the local, rather than the through, rates.

The crux of the case is whether the construction and practice mutually adopted by Union Pacific and Corneli,

whereby it was considered that the transit tariff was complied with by furnishing inbound references after shipment rather than on outbound bills of lading, was a compliance with the tariff. We submit that such is the case.

There is no suggestion of bad faith, no intimation of an attempt to grant or receive a preference or rebate or to discriminate against other shippers. The shipments were in fact transit shipments and entitled to the transit rate. The inbound references were received, examined, approved and acted upon prior to the application and allowance of the transit rate. Unquestionably, the Union Pacific was able to debit Corneli's tonnage credits and satisfy itself respecting the cargo for it actually did so over a period of over four years. Obviously, the purpose of giving Union Pacific inbound references was as fully satisfied as if same were on outbound bills of lading.

It is the law that when a carrier and a shipper place a construction upon a tariff and act in accordance therewith, such construction and practice is entitled to great weight, and it is presumed that both parties conducted their transactions in compliance with the law. For example, in Pacific Portland Cement Company v. Western Pacific Railroad Company (9th Cir. 1950), 184 F. 2d 35, this Court had before it the following situation. The Western Pacific tariff provided with respect to demurrage charges that if the shipper appropriated an empty car without ordering it, it would be considered as having been ordered and become subject to demurrage charges. The question presented was what constituted an "appropriation." Western Pacific and Pacific Portland for 20 years had construed the tariff as permitting inbound cars after same were unloaded to be stored on the tracks of Pacific Portland in its yard. Demurrage was paid from the time the cars were spotted for loading. Western Pacific claimed that since the cars were eventually returned under load that this was sufficient to establish that the cars were held for the purpose of load-

ing from the time they first entered Pacific Portland's tracks, and that they were therefore deemed to have been appropriated at that time within the meaning of the tariff. The District Court's judgment permitting recovery by Western Pacific was reversed by this Court. The opinion points out that if the appropriation took place when the cars were placed on Pacific Portland's tracks, and if Western Pacific failed to charge demurrage from such time the appropriation took place both parties were guilty of crimes, and said that in the absence of substantial evidence to the contrary it is presumed that both parties conducted their business in compliance with the law. Further, that since the demurrage was charged only from the time the cars were spotted, the court would presume that the parties understood and intended that the cars would not be considered appropriated until that time. At the conclusion of the opinion, Judge Orr, speaking for this Court, said, l. c. 39:

> "We also recognize the overriding purpose of the Interstate Commerce Act to enforce the terms of published tariffs rigorously against all carriers and shippers alike so as to prevent special concessions and discriminations in interstate railroad traffic. This policy and the purpose of the tariff would not be served by striking down as illegal the long standing, reasonable and beneficial arrangement between these parties for utilizing otherwise empty trackage owned by appellant in order to relieve congestion at an important railroad yard on an important interstate line."

On substantially similar facts, District Judge Darr reached the same conclusion in Southern Railway Company v. Aluminum Company of America (E. D. Tenn. 1951), 119 F. Supp. 389, affirmed (6th Cir. 1954), 210 F. 2d 139. The method, as in the Pacific Portland case, involved the charging of demurrage from the time the car was spotted for loading. The court held that the method of

operation was consistent with the tariff and established by mutual consent using this language at l. c. 395:

> "The unloaded cars were not left in the yards upon the order of defendant; such cars were not held or appropriated by defendant when they were delivered to the yard and not until they were moved from the yards and spotted for loading; and that demurrage time did begin to run actual placement at an accessible position for loading.
>
> "This was the interpretation placed on the tariffs by the plaintiff for more than 30 years. It prepared and filed its tariff. It should know what they mean, and how they should be interpreted under factual situations. There is no claim that a preference was intended by either party; and the interpretation made was in complete good faith."

In the Southern Railway case, as in the case at bar, the railway contended that its interpretation of the tariffs since 1921 had been erroneous, and the court specifically rejected the so-called "new" interpretation.

Applying the foregoing rules to this case, it is clear that Union Pacific is presumed to know the terms of its tariffs and what practices were legal and permissible thereunder. Union Pacific is the one that prepared and filed the tariffs. There is no suggestion that a preference was intended by either Union Pacific or Corneli. The interpretation was made in complete good faith, all just as in the Southern Railway case. It follows, therefore, that unless the notation of inbound references on outbound bills of lading was an absolute, fixed and exclusive method whereby the transit rate could be availed of, the carrier and shipper would be bound by their own interpretation and practice. The District Court held that the tariff created an absolute condition precedent. We shall now demonstrate that by so doing the court erred. This brings us to the second point of our argument.

II.

It is the position of Corneli that the provisions of the transit tariff were satisfied and complied with when in this case the Union Pacific required inbound references before it allowed and applied the transit rate to Corneli's transit shipments. This court has held that where there is a deviation from a tariff provision, that "adherence to form" contrary to the "plainest principles of fair dealing" and so as to produce an "unjust or absurd conclusion" is not required in arriving at the proper construction of tariffs and compliance therewith. This principle was laid down by this Court in the case of Glickfeld v. Howard Van Lines (9th Cir. 1954), 213 F. 2d 723. The Glickfeld case involved an attempt by shipper Glickfeld to recover from the Howard Van Lines full value for damaged goods when the shipping agreement contained a provision under which Glickfeld assigned a released valuation of 30¢ a pound in consideration of a reduced rate. Glickfeld undertook to escape the effect of the tariff by contending that the carrier had failed to use the specified "Uniform Household Goods Bill of Lading." The 30¢ per pound limitation had been set forth in writing in the so-called order of service, as well as the bill of lading used by Howard. The tariff filed by Howard with the Interstate Commission provided that when property was transported subject to the provision of the tariff "the acceptance and use of the uniform household goods bill of lading as described herein is required," and that "the rates shown herein are reduced rates **conditioned** upon the use of the Uniform Household Goods Bill of Lading." Instead of using the form specified in the tariff, Howard used a form of bill of lading entitled "Combined Uniform Goods Bill of Lading and Freight Bill." The form specified in the tariff contained a provision for the declaration of excess valuations of named articles for which an additional charge, not exceeding 2% of the excess value declared was required to be made,

whereas the form used by Howard provided only that all articles covered by the bill of lading were covered by the released valuation of 30¢ a pound per article. In other words, the bill of lading used contained no provision enabling a shipper to protect certain specified articles by making a declaration of excess value as to them. The evidence was that Glickfeld, the shipper, had asked for and was quoted the lowest rate, and that he had signed the so-called order of service which had printed on it in bold type the agreed or declared value was not to exceed 30¢ a pound per article. Judge Stevens, speaking for this Court, said respecting the foregoing, l. c. 727:

> "Clearly, therefore, neither the shipper nor the carrier with his insurer were prejudiced by the deviation in the form of the bill of lading used. In fact, insofar as the instant shipment was concerned, the issued bill of lading spoke the truth and covered every relevant requirement of the Interstate Commerce Act and the Commission's regulations.
>
> "While it is true that the provisions of the tariff, as published, are binding upon both the shipper and the carrier as a matter of law, those provisions are not to be read or applied in a manner which would lead to an unjust or absurd conclusion. Where the shipper has not been mislead by the deviation, or there is no allegation or proof of an intention or conspiracy to avoid the applicable law it seems to us that the denial of the reduced rate to the shipper, or the requirement that the full value should be paid for the damage would be the acme of adherence to form and contrary to the plainest principles of fair dealing . . .
>
> "The shipper was charged a rate which had been duly filed and approved by the Commission, and which was based upon a written declaration of released valuation as to the property. Since Glickfeld, the

> eventual shipper, asked for and was quoted the lowest rate and, as we have already related, expressed himself as unconcerned with further details for the reason that he was himself insuring against possible shipment losses, the absence of a provision in the bill of lading for a declaration of excess value on specific items was of no primary importance. The shipper got what he bargained for, and the carrier got what it was entitled to under the statute."

Just as in the Glickfeld case, in the case at bar Union Pacific got the applicable transit rate, and Corneli paid the applicable transit rate respecting admittedly transit cargo. Neither Union Pacific nor Corneli was in any way prejudiced by Union Pacific receiving the inbound references before it applied the transit rate, even though this was after the outbound bill of lading had been issued and transit references omitted therefrom. To permit Union Pacific to collect from Corneli in this case the combined local rates on transit shipments is, in fact, a violation of the tariff and the law, and would be, as stated in the foregoing language of this court, "the acme of adherence to form and contrary to the plainest principles of fair dealing."

In Glickfeld, there was an absolute violation of the tariff in that the form required by the tariff was not used and Glickfeld therefore did not have brought to his attention the fact that he could make a declaration for an excess valuation and pay 2% additional charges. This court properly held that this deviation by the carrier did not "prejudice" the shipper, because he had agreed with the carrier as to the 30% limitation.

In the case at bar, Union Pacific could not possibly have been prejudiced by the procedure used in the allowance and application of transit rates to transit shipments.

In Loveless v. Universal Carloading & Distributing Company (10th Cir. 1955), 225 F. 2d 637, the Tenth Circuit Court of Appeals had before it a case wherein the plaintiff, Loveless, sued Universal Carloading for damages to machinery moving in interstate commerce. The standard tariff provision which the court was called upon to construe was the following:

> "As a condition precedent to recovery, claims must be filed in writing with the . . . carrier . . . within 9 months after delivery of the property . . ." and ". . . where claims are not filed . . . in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims shall not be paid."

The shipment involved in the Loveless case was observed to have been damaged upon arrival at destination and Universal's local manager made an inspection and noted upon the consignment memo the apparent extent of the damage and signed his name. Negotiations ensued between Loveless and Universal, Loveless agreeing to accept the machinery and install it with the understanding that a formal claim for damages could be filed within 2 years. This understanding was evidenced by a letter written by the agent of the carrier, Universal. Loveless, the shipper, did not present any formal claim until 19 months after the delivery and liability was denied under the above quoted provisions of the bill of lading. The district court denied the claim. In reversing, the Tenth Circuit, speaking through Judge Murrah, pointed out that by a "practical construction" of the tariff provision it had been held to be satisfied by the courts in a variety of ways such as the exchange of telegrams and the like. He pointed out that the carrier did not contend that it had been prejudiced by failure to receive a formal claim within the 9 month period. The court held that the notation of the fact of damage on the face of the freight bill, the letter acknowledgment by the carrier that damages had been sustained, that a formal

claim would be filed at a future date, satisfied the condition precedent of the tariff respecting notice in writing. The court stated, l. c. 641, respecting its conclusion, the following:

> "Certainly it is no perversion of public policy to denominate the carrier's acknowledgment of damages and liability a claim 'in writing' to be formalized when the extent of damages is determinable. To so construe the writing leaves no doors open for abuses and discriminations which the stipulation in Sec. 2 (b) was intended to prevent. And we therefore hold the written acknowledgment of damages to be a claim in writing within the meaning and purposes of Sec. 2 (b) of the bill of lading."

The Loveless case squarely holds that so-called precedent conditions are to be practically construed, keeping in mind the purpose and objectives of the conditions. The purpose of a transit tariff is as effectually carried out by allowance and application of the transit rate after shipment as before. Indeed, all transit tariffs contain provisions for periodic audit of shippers' records after which all appropriate adjustments are made respecting transit rates. Unused transit tonnage credits are cancelled when it appears that goods inbound to transit points have been sold locally, as was the case in Utah Poultry, supra (147 F. 2d 975), or when the shipper fails to certify the product equivalent of outbound manufactured goods processed from inbound logs, as was the case in Chicago & N. W. R. Co. v. Connor Lumber & Land Co. (7th Cir. 1954), 212 F. 2d 712.

The function and purpose of the transit rate regulations is to preserve the "integrity" of the rate by procedures which protect against substitution of cargo or misuse of tonnage credits. What Union Pacific and Corneli did in this case satisfied such purposes, and the stipulated facts

expressly state that when Union Pacific allowed and applied the transit rate to Corneli's transit shipments and paid the overcharge claim this "had the result of making the effective rate of defendant's (Corneli) true transit shipments exactly what plaintiff's (Union Pacific) transit tariff authorized" (R. 17).

Inasmuch as the District Court relied on Chicago N. W. R. Co., supra, we deem it appropriate to consider the applicability of that decision. Connor Lumber Co. shipped logs to Laona, Wisconsin, a transit point, for manufacturing and reshipment. To avail itself of the transit rate it was required: (a) to ship eastbound over Chicago's line tonnage equal to inbound tonnage (except as reduced by the manufacturing process), (b) to certify the percentage in weight of outbound articles in relation to inbound tonnage, (c) to furnish the inspection bureau copies of inbound freight bills and copies of billing covering all outbound commodities. The bureau kept a debit and credit of weights inbound and outbound and cancelled the oldest inbound tonnage against outbound tonnage giving account to the product percentage, and then billed for undercharges, if any. Connor Lumber paid the transit rate on inbound logs and failed to file the certificate respecting the outbound weight percentage. It claimed the right to pay the local rate on inbound shipments selected at random and relieve itself of its obligations to continue such transit shipment outbound. It was determined by audit in 1948 that Connor Lumber had a tonnage deficit of about 30 million pounds as of December, 1947, that is, its inventory failed to equal tonnage credits by that amount, indicating a failure and inability to ship this amount of tonnage outbound over Chicago's line although bound so to do by reason of having previously shipped same inbound at the transit rate. Application of the local or non-transit rate to this tonnage gave rise to a deficit in freight rate payments of $12,152.70.

The court held Chicago Railway was entitled to collect the local rates. The District Court in the case at bar quoted with approval the following, 212 F. 2d, l. c. 717:

> "It appears that, as to all inbound shipments involved herein, defendant originally desired to and did avail itself of the transit rates plan set up by the aforesaid tariff. It thereby became obligated, in order to obtain the concession of such lower through rates to comply with every pertinent provision of the tariff imposing duties upon it as a shipper."

The context of the foregoing is revealed by the language immediately following, namely:

> "It could not accept the benefits of the program without discharging the burdens thereof. Defendant is prevented by the inherent as well as the expressed purposes of the tariff from ignoring its provision requiring the extinguishment of freight liability on inbound shipments only in their chronological order.
>
> "Admittedly defendant's selection of certain inbound shipments for payment of non-transit rates thereon without regard to the chronological order of such shipments would be to its financial benefit. It contends that it had the right to make that selection, urging that there is no provision in the tariff forbidding a shipper electing, at any time before claim is made by the carrier for undercharges, to pay the applicable local rates on any or all of the in-bound shipments. While there is no express language in the tariff to that effect, the principle upon which the transit rate tariff is based does not permit of such selection by a shipper of any in-bound shipments already transported under the transit tariff. Having elected to operate under that tariff as to particular in-bound shipments, he is required to comply with that tariff until all of his obligations thereunder as to such in-bound ship-

ments have been fully satisfied. Even if he makes payment of non-transit rates on selected in-bound shipments, thus attempting to free them from the tariff provisions, and the carrier actually accepts the payments under those circumstances, there is no effectual waiver. To the extent that the shipper gains a financial advantage by his attempted action, an unlawful preference results, injurious not only to the carrier but to other shippers. The carrier cannot waive the rights of other shippers. The determination as to what in-bound shipments were to be subject to the transit tariff was to be made by defendant when such shipments were made. Under item 4 (a) of the tariff the defendant could have had the shipments waybilled at non-transit rates, but it elected at the time of said shipments to avail itself of the provisions of item 4 (b) and thereby irrevocably impressed the in-bound shipments with the transit rate provisions of the tariff.''

We respectfully submit that the Chicago Railway case does not support the conclusion of the District Court that the tariff in this case is ''mandatory and specific as to what must be done by the shipper in order to secure the single factor or transit rate,'' obviously meaning thereby that inbound references could only be supplied on outbound bills of lading. In the Chicago Railway case, the transit tariff rate was availed of and applied to **normal** shipments and this gave rise to the shipper's duty to thereafter carry out its contract obligations. In the case at bar, Corneli paid the local rate inbound and outbound. When it shipped outbound it did not irrevocably ''impress'' the outbound shipment with the local rate. Nothing in the tariff so provided. To the contrary, the outbound shipment was a true transit shipment so known to be and so treated with respect to which the transit rate was allowed and applied when inbound references were supplied. In Chicago Rail-

road, the local rate was properly applied to local shipments not forwarded which had previously been accorded the transit rate. Just the opposite is the case at hand. The transit rate was applied to transit shipments previously paid at the local rate. Such being the facts, the Chicago Railway case does not sustain the District Court's conclusion that Corneli elected a local rate tariff or contra-wise failed to elect to avail itself of a transit tariff.

III.

The District Court assumed it was not bound by the judgment of the Interstate Commerce Commission, but nevertheless agreed with the Commission's determination that the local combination rates were not inapplicable or unreasonable. Therefore, no purpose is to be served by a separate discussion of the report of the Commission.

It is the position of Corneli that under the law this court is not bound by the judgment of either the Commission or the District Court. The facts in this case are stipulated and not in dispute. The construction and applicability of a tariff requires this Court to exercise its independent judgment. The rule is aptly stated in Sonken-Galamba Corporation v. Union Pacific R. Co. (10th Cir. 1944), 145 F. 2d 808, l. c. 812, 813:

> "The trial court found as a fact that the material shipped had value for purposes other than remelting only, and based thereon reached the legal conclusion that the shipments were not 'scrap iron' as defined in the tariff. Of course the findings of the court, if supported by substantial evidence, are conclusive here and its judgment thereon is also binding unless clearly erroneous. But the ultimate question of whether the shipments were properly classified under the tariff involves an application of the facts to the definition,

and the conclusion to be drawn therefrom, is essentially a legal concept on which this court must exercise its independent judgment."

The District Court correctly assumed that courts are not bound by the Interstate Commerce Commission's determinations. So hold Brown & Sons Lumber Company v. Louisville & N. R. Co., 299 U. S. 393, 81 L. Ed. 301, Baltimore & Ohio Railroad Co. v. Owens-Illinois Glass Company (N. D. Ohio 1954), 133 F. S. 680.

This is particularly true where the question before the Court is merely a construction of a tariff with no factual dispute and if the words to be construed in the tariff have no alleged peculiar meaning necessitating administration expertise determination. **Brown and Sons Lumber Company v. Louisville & N. R.**, 299 U. S. 393, 812 L. Ed. 301. This Court has recently affirmed this principle in the case of **Chicago, M., St. P. & P. R. Co. v. Alouette Peat Products** (9th Cir. 1958), 253 F. 2d 449.

The question presented was the applicability and lawfulness of certain tariff rates which had been determined adversely by the Interstate Commerce Commission. In holding that such a determination was not binding on this Court, it was stated, l. c. 454:

"It is to be noted that the trial court's reversal of the Commission results not from any disagreement with the Commission's findings of fact that the assailed rates were not shown to be unjust or unreasonable, but rather from the trial court's findings that the Commission's conclusion of law that the rates were not otherwise unlawful was erroneous. The conclusion of law by the Commission, which the District Court reversed, was reached by the Commission not in its quasi legislative or rate making capacity wherein it is presumed to be the expert, but in its quasi judicial capacity wherein its adjudications must be gov-

erned by applicable statutory provisions. Conclusions of law by the Commission, while entitled to respectful consideration by the Courts, do not have the same finality as its findings of fact."

CONCLUSION.

In the final analysis this case comes to this. Union Pacific's transit tariff rates were applicable to the nine carloads involved in this case and Corneli was, in fact, entitled to the transit rate. To allow and apply the transit rate Union Pacific was required to be apprised of the origin, date and weight of the inbound cargo so as to identify and charge Corneli's tonnage credits. On this record it is clear that transit rates were not allowed until after Union Pacific had the data. We submit that this was a compliance with the tariff. To hold otherwise results in applying local rates to transit shipments and this is unlawful. The latter result can only be reached in this case by a triumph of form over substance. However strictly tariffs are construed constructions are not to be such as lead to absurd and unjust results as this Court so aptly said in the Glickfeld case.

Appellant respectfully urges that the judgment of the District Court should be reversed.

Respectfully submitted,

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Appellant.

I certify that on the ..... day of September, 1958, I served three full, true and correct copies of the foregoing brief upon the plaintiff (appellee) by enclosing a copy in

an envelope addressed to plaintiff's (appellee's) attorney as follows:

Mr. L. H. Anderson, General Attorney,
Union Pacific Railroad Company,
Carlson Building,
P. O. Box 530,
Pocatello, Idaho,

that being his last known address, and depositing the same, postage prepaid, in the United States Post Office at St. Louis, Missouri.

.....
Counsel for Appellant.

Subscribed and sworn to before me this ..... day of September, 1958.

.....
Notary Public.

My term expires .....